IN THE

Supreme Court of the United States

October Term, 1951

No. 448

FEDERAL TRADE COMMISSION,
Petitioner,

against

THE RUBEROID CO.,
Respondent.

No. 504

THE RUBEROID CO.,
Petitioner,

against

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF FOR THE RUBEROID CO.

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Opinion Below.

The opinion of the court of appeals (R. 95) is reported at 189 F. 2d 893. The opinion on rehearing (R. 118) is reported at 191 F. 2d 294.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 15 of the United States Code, Section 21, and Title 28 of the United States Code, Section 1254(1). The final decree of the court of appeals, here for review, was entered on September 5, 1951 (R. 123). Certiorari was granted herein January 28, 1952.

Statutes Involved.

Sections 2(a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act (Act of October 15, 1914, as amended by Act of June 19, 1936, 49 Stat. 1526; 15 U. S. C., sec. 13); Section 11 of the Clayton Act (Act of October 15, 1914, 38 Stat. 734; 15 U. S. C., sec. 21). The relevant portions of these sections are printed herewith as Appendix A.

Statement of the Case.

The Federal Trade Commission issued a cease and desist order against The Ruberoid Co. on January 20, 1950, in a proceeding upon complaint charging said respondent with price discrimination in violation of Section 2(a) of the Clayton Act. The Ruberoid Co. petitioned the court of appeals for review pursuant to Section 11 of that Act, asserting that the order was too broad in scope and asking that it be modified. The Commission filed no application or cross-petition for enforcement, and made no charge of non-compliance. However, at the end of its brief in opposition to modification it requested the court "pursuant to the statute" to enter a decree commanding compliance. The court of appeals affirmed the order, but, on rehearing, declined to grant an injunction. Cross-petitions for certiorari were granted by this Court.

For the sake of clarity The Ruberoid Co. hereinafter will be referred to as "petitioner", and the Federal Trade Commission as the "Commission".

The Facts.

The Commission's complaint, dated July 26, 1943, alleged that petitioner was engaged in the business of manufacturing and selling asbestos and asphalt roofing, insulat-

ing materials and allied products throughout the United States, selling its products directly to wholesalers, retailers and applicators (R. 1). "Applicator" is the trade term for a roofing contractor who applies roofing materials to buildings on a contract basis, the price charged covering the materials used and the labor employed on the job (R. 2). It was alleged that petitioner had granted certain trade discounts to some purchasers of its products, not allowed other competing purchasers; and that the effect of such discriminations had been, or might be, substantially to lessen, injure, destroy or prevent competition between such purchasers.

Hearings were not held until after the war, in 1946. The Commission introduced testimony and invoices showing that during the year 1941, in New Orleans, Louisiana, petitioner had allowed a discount of 5%, and in some cases 7½%, to four customers functioning as applicators or as retailers, in addition to the discounts then allowed other applicators and retailers in that area (R. 60-65). No evidence of discrimination at any other time or place was offered. It appeared from the evidence adduced by the Commission that the allowance of these 1941 discounts resulted from competitive conditions local to New Orleans, that petitioner's pricing policy there was not indicative of its pricing elsewhere, and that at the time of the hearings in 1946 petitioner was selling to only five customers in New Orleans (the four previously favored and one wholesaler), selling to all on the same terms, regardless of function or quantity (R. 20).

Petitioner did not dispute that these local 1941 discriminations had occurred, nor did it attempt to justify them under the statute. Proposed findings and conclusions were agreed upon, except as to one point, between the

opposing attorneys, and were submitted to and adopted by the trial examiner (R. 60-65). The sole point of dispute was whether the evidence established discrimination in price between wholesalers, and on this point the Commission upheld petitioner (R. 84). After briefs and argument (turning principally on the scope of the order to be issued) the Commission made its "findings as to the facts" and ordered petitioner to cease and desist from discriminating in price in the sale of its roofing materials in commerce

> "By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

Petitioner duly petitioned the court of appeals for review and modification. Petitioner did not contest the Commission's factual findings, or its conclusion that the price discriminations established in New Orleans were unlawful. It took the position below, and asserts here, that the order is invalid as a matter of law; in that it prohibits *all price differentials*, however, small, in the prices charged competing purchasers at any level of competition, that such differentials are at most prima facie unlawful under the statute, and that there is no exception or proviso affording petitioner an opportunity to justify or defend them if charged with violation.

The Commission admitted that this order was a radical departure from its prior orders in like cases; at least no similar order has previously reached the courts. During its fifteen years' administration of the Robinson-Patman Act the Commission's orders under Section 2(a) have consistently included an exception or proviso permitting differentials justified by cost differences, and many orders

have contained a proviso exempting differentials made in good faith to meet competition. Prior orders have limited the differentials prohibited to those found substantial or which may have the proscribed effect on competition. The Commission stated in its brief below that this case "represents another milestone in the Commission's effort to establish a fair and just interpretation of the Robinson-Patman Act". The pertinent provisions of representative orders issued by the Commission in "competing purchasers" cases during the past ten years are set forth in Appendix 2 of this brief for purposes of comparison.

The Commission was forced to concede that as to differentials of a different character or granted under different circumstances than those established petitioner should have the right to assert the defenses which the Act permits, and assured the court that it was not its intention to seek enforcement of this order beyond the boundaries of the statute. Apparently accepting these assurances the court refused modification, but stated in its opinion that, if subsequently charged with violation of the order, petitioner would not be denied the right to avail itself of the defenses which the Act provides. The opinion states (R. 97):

> "Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discrimination and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have

> the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled."

And upon rehearing the court said further (R. 118):

> "Though affirming the order, we attempted to set at rest any doubts petitioner had then, in a subsequent proceeding based upon an asserted violation of the order, if it should arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to introduce in its defense evidence that the conduct complained of was permitted by exceptions contained in the Clayton Act itself as amended. This, as we understood its position, was substantially all petitioner desired."

As to the prohibition of all price differentials without regard to effect on competition, the court held, relying on this Court's decision in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, that "it is quite clear that an order may legally prohibit *all* differentials". The court stated that, assuming that the Commission might have found differentials of less than 2½% to be immaterial under the evidence, "we cannot force such a finding upon it".

The court of appeals did not include in its decree a provision enjoining violation of the terms of this order. The Commission filed no formal application or cross-petition for enforcement. At the end of its brief it made a bare, unsupported request that an injunction issue "pursuant to the statute", citing and quoting a provision of the Federal

Trade Commission Act having no application to this proceeding. No violation or threat of violation of the order was charged, and no facts claimed to indicate need for an injunction were called to the court's attention.

On the initial hearing the question of enforcement was not argued, and the court upon affirming the order added the words "enforcement granted". Respondent thereupon petitioned the court for rehearing, pointing out that the Commission was not entitled to an injunction as a matter of right or of course, and asking the court in the exercise of its discretion to deny enforcement on the ground that the practices found unlawful by the Commission had long since been abandoned by respondent, that respondent had never asserted the validity of those practices or the right to renew them, and that there was no reason to apprehend renewal. The Commission opposed rehearing, but again was unable to point to any factual evidence of violation or threatened violation of its order within the limitations as to enforceability placed upon it by the court's opinion. The court granted the petition for rehearing and struck the words "enforcement granted" from its decision. A decree was thereupon entered affirming the order, without injunctive provisions.

Questions Presented.

1. The Federal Trade Commission, in a proceeding under Section 2(a) of the Clayton Act, having established certain differentials in the prices theretofore charged by petitioner to competing purchasers of its roofing materials in certain local transactions, and petitioner having offered no evidence that said differentials were justified by differences in its costs, and the Commission having found that said differentials constituted unlawful discriminations in

price, may the Commission thereupon validly prohibit all differentials of any character or amount in the prices charged competing purchasers anywhere without regard to whether such differentials make only due allowance for differences in petitioner's cost of manufacture, sale or delivery resulting from differing methods or quantities of sale or delivery?

2. The respondent in a proceeding under Section 2(a) of the Clayton Act having failed to justify its lower prices as having been made in good faith to meet competition, and the Commission having found that certain of such prices were unlawfully granted, may the Commission validly prohibit all future differentials between competing purchasers without exception or exemption of lower prices thereafter made in good faith to meet the equally low and lawful prices of competitors?

3. The Commission having found that the record does not establish discrimination in price by petitioner between wholesalers, and having made no finding as to what differential in the prices charged competing wholesalers would or might be sufficient in amount to substantially affect competition, may the Commission validly prohibit any differential whatever in petitioner's prices to competing wholesalers under any competitive conditions anywhere?

4. May the Commission validly issue an order having the effect of prohibiting any price differential in the sale of roofing materials to competing manufacturers of prefabricated housing, without any allegation, proof or finding as to what differential in the prices charged such manufacturers would be sufficient to substantially affect competition?

5. In a proceeding upon petition filed pursuant to Section 11 of the Clayton Act for review of a cease and desist order of the Federal Trade Commission, wherein the Commission makes an application or request for enforcement of the order, and wherein the petitioner denies that it has failed or neglected to comply with the order or intends to do so, does the statute make it mandatory for the court of appeals to issue a decree enjoining violation of the order to the extent affirmed, irrespective of any showing of non-compliance or present threat of non-compliance?

6. If enforcement is discretionary in the absence of such a showing, did the court abuse its discretion in denying an injunction where compliance with the order was not in dispute and where the Commission offered no evidence of threatened non-compliance other than its finding that petitioner had violated the Act ten years previously?

ARGUMENT.

I.

The order invalidly prohibits differentials which are not unlawful under the Act.

Not all differentials in the prices charged by a seller of a commodity to purchasers competing in the resale thereof are unlawful under Sections 2(a) and (b) of the Clayton Act. Such differentials are not prohibited (1) if neither of the sales involved is in commerce, (2) if the goods are not of like grade and quality, (3) if the differential is not one the effect of which may be substantially to lessen or injure competition, (4) if the differential makes only due allowance for differences in the seller's costs resulting

from differing methods or quantities of sale or delivery, or (5) if the lower price was made in good faith to meet the equally low price of a competitor.

The Commission limited this order to sales made in commerce and to roofing materials of like grade and quality, but with those limitations the order prohibits any differential whatever in the prices which petitioner may charge any competing purchasers anywhere, without regard to probable or even possible effect on competition, without regard to cost justification, and without regard to competitive situations. The order is not indefinite or ambiguous and does not require construction. We submit that an order which expressly prohibits what the enabling Act permits is invalid as a matter of law and should not stand.

We believe that in every prior order issued by the Commission since the passage of the Robinson-Patman Act, prohibiting discrimination between competing purchasers, the Commission either has excepted differentials justifiable by cost differences in the affirmative portion of the order or has added a proviso exempting them. The Commission has recognized, prior to this case and since, that a finding that certain differentials are sufficient in amount to substantially lessen or injure competition will not support an order prohibiting substantially smaller differentials, even between purchasers of the same functional class. (See Appendix 2 of this brief.) Many of its orders have contained a proviso exempting differentials made in good faith to meet competition, although prior to this Court's decision in the *Standard Oil* case (340 U. S. 231) the Commission did not construe the proviso of Section 2(b) of the Act as offering a complete defense. It thus appears

that this order presents a radical change in the Commission's interpretation of the limits of its own prohibitory powers.

The metamorphosis of the Commission's orders in Robinson-Patman Act cases and the vacillation of its policy on the inclusion of provisos are discussed and analyzed in an article in the current issue of the Harvard Law Review, wherein the author refers to "the recent drastic and complete reversal of Commission thinking as to the future availability of these three defenses to disprove charges of violation of the order." *

The question here presented is not one of appropriate remedy. This is not a case where the order prohibits other *unlawful* acts reasonably related to those found unlawful (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436). Neither is this an instance of prohibition of practices not lawful in themselves but found to have been used for an unlawful purpose. It can hardly be contended that the Commission is justified, as a matter of remedy, in prohibiting *all price differentials* between competing customers in order to effectively prevent unlawful discriminations.

The principal contention made below in support of this order was that since petitioner had not offered evidence at the hearing to establish cost justification or the good faith meeting of competition it was "foreclosed" from raising those issues in any proceeding for enforcement of the order. This wholly ignores the fact that a cease and desist order

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* Shniderman, "Federal Trade Commission Orders Under The Robinson-Patman Act: An Argument For Limiting Their Impact on Subsequent Pricing Conduct", 65 Harvard Law Review 750 (March, 1952).

looks to the future, and that the prohibitions of this order extend far beyond the differentials which were litigated and found unlawful in New Orleans. The violations charged were differentials of 5% and 7½% in the prices charged New Orleans applicators and retailers. Petitioner could not have defended this charge by showing that a differential of 2% between certain of its customers, even in New Orleans, would have been justified by cost differences; yet future differentials in that amount or any amount are prohibited. Petitioner could not have defended by justifying its carload or other quantity discounts, since such discounts were not involved. Obviously it could not have defended by showing that a lower price made to one of several competing customers in some other locality was made in good faith to meet competition, nor could it have justified in advance the necessity for meeting new competitive situations as they arise. This order, nevertheless, extends to all such situations.

It is true that petitioner asserted the defenses of cost justification and meeting competition in its answer, and offered no proof in support thereof. That is material only as to the finding of past violations, which are not in dispute. Petitioner did raise before the Commission the questions here presented as to the scope of the order (Petitioner's exceptions 24 and 25 to the trial examiner's recommended decision, R. 83). The Commission's position seems to be that, having proved that petitioner had unlawfully discriminated between *certain* competing purchasers, it was justified in assuming that *any* differential between *any* competing purchasers was and would be equally unlawful in the absence of proof to the contrary. This would mean that a seller confronted with a single violation would have the impossible burden of justifying every differential,

every discount, and every competitive situation throughout its entire business at pain of being enjoined from doing what the statute permits.

Petitioner Would Be Unable to Do Business Under an Order Denying it the Defenses of Cost Justification and Meeting Competition.

As to cost justification, it should be sufficient to point out that the order prohibits all quantity differentials. Roofing materials are heavy goods, and freight and transportation costs are very substantial. This order would prevent petitioner from granting a discount to customers purchasing in carload lots. The record shows that petitioner sells its products in carload and less than carload quantities, at different prices (R. 17-18). This carload differential was not involved in the transactions attacked in this proceeding, and petitioner had no occasion to justify it. Yet this order would require petitioner to sell to all competing customers at one price, regardless of quantities purchased or method of sale or delivery. For example, petitioner would be prevented from selling its products to a private brand customer at a differential reflecting the saving of advertising and selling costs which are incurred in the sale of branded merchandise. The Commission has always recognized the validity of differentials reflecting such cost savings.

This order would also prevent petitioner from meeting competition in good faith by defending itself against a competitor's raid on a customer, which this Court has held that it has a right to do. In *Standard Oil Company v. Federal Trade Comm.*, 340 U. S. 231, this Court held that meeting the equally low price of a competitor in good faith is an absolute defense to a charge of unlawful price discrimina-

tion, at least where the price met is a lawful price. We believe this is the first case to reach the courts, since that decision, presenting the question whether a Section 2(a) order prohibiting price differentials between competing purchasers must include a proviso exempting differentials made in good faith to meet competition.

The fact that petitioner did not sustain the defense of meeting competition at the hearings in this case is no reason for denying it that defense in the future. Let us assume that petitioner is now selling its roofing materials to applicators and retailers in New Orleans at identical prices, in compliance with the order; and that tomorrow a competing manufacturer offers one of these customers a lower price for a comparable product. Under this order petitioner would be prohibited from meeting the competitor's price except by lowering its price to all of its customers in that area, which this Court has held the statute does not require. Under such circumstances petitioner's customers would be easy prey to competition.

The Order Should Be Definite and Certain. It Is No Answer to Say that the Statutory Exceptions May Be Availed of in the Event of "Changed Circumstances."

The Commission made the hedged concession below that upon the basis of changed facts or circumstances petitioner should have the right to assert the defenses which the Act permits. It suggested that if in the future petitioner should claim that certain prohibited differentials are lawful it might then resort to the Commission or to the court for modification of the order. It assured the court that it would not institute enforcement proceedings without first giving petitioner an opportunity to demonstrate *to the Commis-*

sion that its prices were justified by cost differences or by competition. Apart from the illusive character of such assurances, the fault with this order is that it prohibits differentials which were lawful when the order was issued and are lawful now. It is no answer to say that correction of present invalidity should be postponed to the future. Petitioner is entitled to know now what this order prohibits so that it can carry on its business accordingly.

The court of appeals refused modification, but stated that "no contempt can be found for legally permissible acts"; and that "it is surely not necessary to repeat the wording of the statute in the order itself". This reassurance, at best indefinite, was qualified. After pointing out that petitioner had not offered evidence in justification of the discriminations proved, the court continued

> "Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled."

Upon rehearing the court again indicated that in a subsequent enforcement proceeding involving alleged violations arising under "different circumstances" petitioner would be able to introduce in defense evidence that the differentials complained of were permitted by the exceptions contained in the Act (R. 118-119).

As we read these pronouncements they mean that (except as to differentials given under the same "circum-

stances'' as those previously found unlawful) petitioner may violate the order with impunity so long as it complies with the law. This would be of doubtful benefit since the Act itself (in the language of the court) ''is vague and general in its wording'' and ''cannot be translated with assurance into any detailed set of guiding yardsticks''.

Judged by the tests applicable to injunctions, the proposed construction of this order does violence to established principles of equity jurisprudence. It is, of course, fundamental that a valid injunction must be sufficiently definite and specific so that the person enjoined may look to the injunction to ascertain what is necessary for compliance. This cease and desist order is definite and specific—and so read is invalid; yet the court of appeals has attempted to save it by giving notice that it will not be treated as meaning what it says if an attempt is made to enforce it. The court says that it is unnecessary to write the statutory exceptions into the order, but that, if called upon to enforce, it will read these exceptions in ''to the extent that they are legally applicable''.

The opinion below leaves the question of compliance with the order in a jumble of confusion and doubt. Petitioner must now guess to what extent the statutory defenses and provisos will be deemed ''legally applicable'' if it is charged with a violation of the order. It must guess what differentials the Commission and a differently constituted court will find to be ''legally permissible'' under the statute. It must guess whether pricing and competitive situations existing today, or which may arise tomorrow, present a sufficiently ''definite change of circumstances'' to warrant

"a new hearing on the facts". We submit that no business concern should be required to conduct its affairs under such a fiat.*

In an enforcement or contempt proceeding upon a charge of violation of an injunction the issue of violation is to be determined upon the terms of the injunction, not by reference to the law under which the injunction was issued. This precise question was presented in a recent case arising under the California Unfair Practices Act. *People* v. *Gordon*, 234 P. 2d 287 (California District Court of Appeals, July, 1951). That Act prohibits selling below cost "for the purpose of injuring competitors or destroying competition". In an action by the State to restrain alleged violations the court issued a preliminary injunction prohibiting the defendant from selling below cost, without qualification. In granting modification the appellate court said:

> "Respondent's contention that all restrictions and exceptions provided for in the act should be considered incorporated by implication and that appellant cannot be prejudiced because insofar as an action covered by the injunction would not violate the act the injunction could not be enforced by contempt

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*"The business man will continue to be baffled, for he will not find in the four corners of the order reference to defenses he has been informed are sometimes available and sometimes not. The line of demarcation, he will learn from counsel, is far from clear; the important decision is whether a pricing practice falls within the scope of things 'foreclosed', or more appropriately reflects pricing under a 'definite change of circumstances.' It is in this area of distinction that the Second Circuit's concession to enforcement simplicity will cause an unwise legal development unless the nature of matters deemed foreclosed is narrowly confined." Shniderman, "Federal Trade Commission Orders Under The Robinson-Patman Act: An Argument For Limiting Their Impact on Subsequent Pricing Conduct", 65 Harvard Law Review 750, 768 (March, 1952).

> proceeding is without merit. Defendant must be able to determine from the injunction what he may and may not do. (*Gelfand* v. *O'Haver*, 33 Cal. 2d 218, 222 [200 P. 2d 790]; *Morris* v. *George*, 57 Cal. App. 2d 665, 667 [135 P. 2d 195]). When the injunction is too broad restriction should not be left to a construction with the aid of the statute. We shall therefore modify the injunction so as to contain the required restriction."

In the court below the Commission expressed apprehension that, if provisos are inserted in the order, and if it should later charge petitioner with violation, it would have the burden of proving that the discriminations charged were not justified by cost differences or by meeting competition. This point was raised only by the Commission, not by petitioner as erroneously stated in the opinion (R. 97). The Commission has been inserting these provisos in its orders ever since the Robinson-Patman Act was passed, without apparent hindrance to enforcement. Presumably the seller would have the burden of establishing affirmative defenses under provisos of a cease and desist order or injunction, to the same extent as under provisos of a statute. Whether that is true or not, the question is not presented here.

This order should, at the least, be modified by the insertion or addition of exceptions or provisos unequivocally excluding differentials which are permissible under the cost justification and meeting competition provisos of Sections 2(a) and (b) of the Clayton Act.

II.

The order should be limited to the prohibition of differentials between purchasers competing as applicators or as retailers.

The price discriminations found by the Commission (Findings, Paragraph Four) were between purchasers of petitioner's products "competing in the resale of these products as roofing contractors or applicators and as retailers" (R. 89). The Commission ruled and found that the record does not establish discrimination by petitioner among wholesalers (R. 84, 89). These findings, of course, are conclusive and are binding upon the Commission here. It is therefore unnecessary to examine the evidence on these points.

It is clear, then, that the facts as found do not support an order prohibiting differentials between purchasers competing other than as applicators or as retailers, on the basis of past violations. Nevertheless this order prohibits *any* price differential between purchasers competing by *any* method or at *any* level of competition in the resale or distribution of roofing materials, including wholesalers, jobbers and manufacturers. A quantity or cash discount of 1% or 2%, or even ½ of 1%, between competing wholesalers would violate this order. There is no allegation or evidence of sales by petitioner to manufacturers—yet petitioner might be held in violation of this order if it sold shingles or siding at slightly different prices to two competing manufacturers of prefabricated houses. Such a manufacturer is engaged in the "resale or distribution" of roofing materials to the same extent as an applicator who is paid for constructing a roof. All such differentials

are prohibited by this order without regard to whether any given differential would or could substantially affect competition between the purchasers concerned.

The issue presented is whether and to what extent the Commission, having established that certain differentials in the prices charged competing purchasers of one functional class were substantial in their effect on competition at that level, may properly issue an order prohibiting differentials of lesser amount or any amount between purchasers of other functional classes competing under different competitive conditions.

The discriminations in price affirmatively prohibited by Section 2(a) of the Clayton Act include only those

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

The statutory test is *substantial* adverse effect upon competition, not whether the purchasers charged different prices are competitors in the resale of the goods. Where the competition alleged to be affected is between sellers, the discrimination need not be between competing purchasers to fall within the statute. (Cf. *Muller & Co.* v. *F.T.C.*, 142 F. (2d) 511 (6th Cir., 1944); *Moss, Inc.* v. *F.T.C.*, 148 F. (2d) 378 (2d Cir., 1945).) And even where competing purchasers are concerned, the discrimination is not unlawful unless the difference in prices charged is sufficient in amount to confer a substantial competitive advantage on the favored purchaser. Whether such a

differential is one which may substantially lessen or injure competition is a question of fact in every price discrimination case, and a question on which the Commission or plaintiff has the affirmative.

We are not here concerned with the requirements of a prima facie case. It may be that, as stated by the court in *Moss, Inc.* v. *Federal Trade Commission, supra,* Section 2(b) of the Clayton Act has the effect of "shifting the burden of proof to anyone who sets two prices", and that proof of even a small differential in the prices charged competing purchasers is enough to throw upon the respondent the burden of showing that such differential would not substantially affect competition. Assuming that to be true, the Commission itself has found that this record does not establish discriminations in price between wholesalers. Prima facie evidence is subject to rebuttal; and petitioner had no occasion to offer evidence as to the effect of discriminations not established. It would have no such opportunity if charged with violation of this order. The question here is not whether the Commission may prohibit established differentials between competing customers in the absence of rebuttal evidence; the question is whether it may prohibit differentials *other and less than those established,* without evidence and findings that such differentials might substantially affect competition if granted.

The Commission has recognized in prior cases that not all price differentials between competing purchasers are sufficiently substantial in their effect on competition to amount to unlawful discriminations. In *Matter of Kraft-Phenix Cheese Corp.*, 25 F. T. C. 537, it appeared that Kraft gave a 5% discount on packaged cheese and salad products to retailers buying more than $5.00 worth in a

single purchase, and that an appreciable number of retailers did not obtain the discount. After referring to evidence that the 5% differential did not materially affect retail prices or result in any appreciable diversion of trade or impairment of profits, the Commission concluded "that such price differentials do not tend to injure competition between retailers reselling said products". The complaint was dismissed.

Paragraph Five of the Findings (R. 89) contains what apparently is intended as an explanation for the issuance of this order in its present broad terms. After pointing out that one applicator resold to some extent to other applicators, and that another customer classified by petitioner as a wholesaler also engaged in business as an applicator, the finding states:

> "The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers."

We agree that the action taken by the Commission should be sufficient "to stop the discriminations" which "the record establishes". The Commission has found that the discriminations established by the record were between purchasers "competing in the resale of these products

as roofing contractors or applicators and as retailers" (R. 89). We agree that the particular terms used by petitioner or by the trade to describe or classify these purchasers are immaterial.

We are here dealing with actualities. In using the terms "wholesalers", "retailers" and "applicators" we refer, and the order should refer, to purchasers in fact performing these respective functions in the resale or application of petitioner's products. Concededly, a customer who resells in part as a wholesaler and in part as an applicator or as a retailer (regardless of how classified) is not entitled to a wholesaler's functional discount on the materials which he resells in applied form or at retail in competition with other applicators or other retailers. But the fact that some purchasers of roofing materials resell and compete at more than one functional level does not justify this order. That situation would be adequately covered and guarded against by an order limited to discriminations between purchasers *in fact competing in the resale or distribution of petitioner's products at retail or as applicators.*

Parenthetically it may be noted that the court of appeals also appears to have become confused on this point. The opinion states that "to many of us an 'applicator' who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a wholesaler". The terms "wholesaler", "retailer" and "applicator are well recognized and differentiated functional trade classifications. Classification of function is to be distinguished from classification of customer. Applicators resell to consumers (house owners) and in the performance of that function they bear no resemblance to wholesalers.

The error into which the Commission has fallen, and which is carried into the order, is demonstrated by the statement (in the paragraph of the findings above quoted) that "The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question". Having reached this conclusion the Commission proceeded to issue an order prohibiting all price differentials between competing purchasers. The error in the above statement, of course, lies in the omission of the word "unlawful". The controlling factor in the proceeding was that the record established *unlawful* price discriminations among competing purchasers. The discriminations established between applicators and between retailers were unlawful because found to be sufficient in amount to substantially affect competition. It does not follow that the same or lesser differentials would be substantial as to competition between wholesalers or between manufacturers, and there is no finding to that effect. Proof of certain price discriminations between purchasers of one functional class is not sufficient to support an order prohibiting any differentials whatever between any competing purchasers at any level of competition.

In the aspect now under consideration the invalidity of the order from a legal standpoint could be cured by addition of the single word "substantially" after "prices". The order would then prohibit only substantial price differentials, and the term "substantially" could be construed as referring to differentials which may substantially affect competition as defined in the statute. That, however, would not validate this order; since this Court has held in *Federal Trade Comm.* v. *Morton Salt Co.* (334 U. S. 37), that the Commission may not properly leave to subsequent enforce-

ment proceedings the determination of what differentials may be substantial in their effect on competition.

We believe that the court of appeals has fallen into serious error in interpreting this Court's decision in the *Morton Salt* case as making it "quite clear that an order may legally prohibit *all* differentials" (italics the court's). We do not so understand the decision. This Court there stated (pp. 53, 54):

> "Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not in either (a) or (b) taken action which forbids such noninjurious differentials. But other objections raised to the qualifying cluases require consideration.
>
> "One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to *make findings* concerning possible injury to competition. Such findings are to form the basis for cease and desist orders *definitely restraining the particular discriminatory practices which may* tend to injure competition without justification. * * *
>
> "Whether on this record the Commission was *compelled* to exempt certain differentials of less than five cents we do not decide. * * *" (Italics supplied.)

We interpret this language to mean that a cease and desist order in a case such as this must be supported by evidence and *findings* that the effect of the differentials prohibited may be substantially to lessen or injure competition; that the Commission, as "a body of experts", may hear evidence and make findings as to the effect on competition of differ-

entials *less than those proved*, in order to provide a factual basis for an effective order; and that differentials not found sufficient to have a substantial adverse effect on competition must be excluded or exempted from the order. The Commission accepted and followed this construction of the *Morton Salt* decision in *Matter of F & V Manufacturing Co.*, 46 F. T. C. 632 (opinion and order March 14, 1950, two months after the issuance of the present order).

This case dealt with local price discriminations between applicators and between retailers. The testimony dealt entirely with competition in those functional classes. Only one exclusive wholesaler (Lyle) was called, and he was not questioned regarding competition. It is true that the Commission found that "Respondent recognized that a difference of 2½% was material to its customers in the possible diversion of trade" (R. 89); but it is clear from the context that the Commission was there speaking only of applicators and retailers.

In the opinion below it is said that "petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35". The position actually taken was, and is, that one who is found guilty of exceeding a 30-mile speed limit for traveling 50 miles per hour should nevertheless not be prohibited thereafter from traveling 20 miles per hour or less. The Commission's function is to set the price differential speed limit upon evidence and findings as to what differentials may substantially lessen or injure competition. Here no speed limit was set for wholesalers, and only as to applicators was the limit set at zero.

It is submitted that in the absence of any finding of discrimination between wholesalers or between manufacturers purchasing petitioner's products, and in the absence of any substantial evidence as to what differentials would be sufficient to affect competition between customers of those classes, the order should be limited to the prohibition of differentials between purchasers in fact competing as applicators or as retailers. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426.

III.

The Court of Appeals properly declined to grant an injunction.

Introductory Statement.

The petition for certiorari filed on behalf of the Commission presents a question of construction of the enforcement provisions of Section 11 of the Clayton Act. The pertinent provisions of that section are as follows:

> "If such person fails or neglects to obey such order of the commission * * * while the same is in effect, the commission * * * may apply to the United States court of appeals * * * for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order * * *.
>
> "Any party required by such order of the commission * * * to cease and desist from a violation

> charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order * * * be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order * * * as in the case of an application by the commission * * * for the enforcement of its order, * * *.
>
> "The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission * * * shall be exclusive."

This statute has been on the books for thirty-eight years, without amendment of these provisions. Pursuant thereto the courts of appeals have been called upon to review and enforce orders of the Commission in hundreds of cases. The decisions are not in conflict. That in itself provides strong reason for not disturbing at this late date a construction accepted and consistently followed for so long a time.

The Clayton Act and the Federal Trade Commission Act were companion statutes originally enacted in 1914. The provisions for enforcement and for judicial review of cease and desist orders of the Commission were the same in each, and remained the same until 1938. In 1938 the Commission sought and obtained an amendment of Section 5 of the Federal Trade Commission Act striking out the provision for enforcement upon application of the Commission, making the Commission's orders final after 60 days unless a petition for review is filed within that period, and prescribing penalties for violation. As amended, that section also provides that the court of appeals "shall have power to make and enter * * * a decree affirming, modifying or setting aside the order of the Commission,

and enforcing the same to the extent that such order is affirmed", and that "*To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience of the terms of such order of the Commission.*"

The courts did not differentiate between the enforcement and review provisions of the two statutes prior to 1938, and the decisions in Federal Trade Commission Act cases are equally in point on the questions here presented. The majority of the decided cases arose under that Act. The amendment in 1938 indicates that the decisions up to that time were not in accord with the construction which the Commission had theretofore urged and is now urging. Since that time the Commission has repeatedly asked Congress to amend Section 11 of the Clayton Act in the same respects. Bills to that end have been pending in Congress for a number of years. See F. T. C. Annual Report for fiscal year 1951, page 8.

The court of appeals here found it to be "settled that the F. T. C. cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent"; and held that where the application for enforcement is made as a cross-petition in a proceeding upon petition for review "the same showing of a threatened violation of its order" is required as if the proceeding had originated upon such application.

Petitioner assured the court that it had complied with the order (R. 106), and pointed to evidence in the record indicating its discontinuance of the discriminations found unlawful prior to the Commission hearings. Petitioner did not deny that those discriminations were prohibited by

the Act nor did it assert the right to resume them. It sought only modification of the order to the extent that the order prohibits what is not unlawful.

The Commission asserts that where the court of appeals affirms a cease and desist order issued under this section it is the *duty* of the court to issue a decree commanding compliance, regardless of any showing of actual or threatened violation; that the statute in effect makes an injunction upon affirmance mandatory. Apparently the contention is that if the court affirms the order in whole or in part upon petition for review it must decree enforcement even though no application therefor is made by the Commission,

These contentions are not new. The Commission has been chafing under the enforcement provisions of the Clayton Act and (prior to 1938) the Federal Trade Commission Act for thirty years. It has repeatedly made this same complaint in the courts of appeals and has always been rebuffed.[1] No court has held that this statute contains a mandate to the court of appeals to enjoin violation of a Commission order upon affirmance, where non-compliance is denied, without evidence that the order has been disobeyed or that disobedience is presently threatened. No court has held that it would be an abuse of discretion to deny enforcement under those circumstances. No court has held that the considerations governing enforcement are different in the case of a cross-application filed in a proceeding upon petition for review than in the case of an original application. As we will show, the decisions in the

[1] See *L. B. Silver Co.* v. *Federal Trade Comm.*, 292 Fed. 752, 753, 754 (6th Cir.; 1923), where this precise issue was raised, and cases cited in subdivision "A" of this Point, *infra*.

several circuits are in accord. The cases do not support Judge Clark's reference (in his dissent below) to a "changing trend" in the decisions, toward a "newer and more direct procedure".

There is no factual issue as to petitioner's compliance with this order. In the court below the Commission made no charge or showing of non-compliance, actual or threatened. It asserts here that such evidence is immaterial, even where non-compliance is denied. The premise of the discussion here is that petitioner has fully complied with this order since its issuance and that there was before the court below no evidence of threatened violation other than the possibility of renewal of the price discriminations which the Commission found to have occurred in 1941, five years before the hearings and ten years before the application for enforcement was presented to the court.

In the court below the Commission took the square position that the necessity for proof of non-compliance depends upon whether the application for enforcement is an original application or a cross-application. In its answer to the petition for rehearing it stated that the statutory provision for enforcement upon its own application "specifically requires the Commission to prove a violation of its order before an enforcement decree will issue"; but that "no such requirement can be found in the provisions of the Act under which this proceeding was instituted" (R. 113). The Commission further stated that its prayer for affirmance and enforcement in the concluding paragraph of its brief was "in the nature of a cross-petition" (R. 111).

Apparently the Commission now recognizes the weakness of contending that Congress intended to make the con-

ditions for enforcement of Clayton Act orders depend on which party first takes the case to court. It is here asserted that even when the Commission originally applies for enforcement a shawing of actual or threatened violation is not a condition of enforcement. We suggest that upon the answer to that question hinges the correctness of the decision below. If proof that the order has been violated, or that violation is presently threatened, is the statutory prerequisite for enforcement upon application of the Commission, then certainly Congress did not intend to impose that requirement only when the Commission finds it necessary to proceed for enforcement, and to penalize a respondent who complies with the order in so far as valid merely because he exercises his right to judicial review.

A. A Finding of Non-Compliance or Presently Threatened Non-Compliance Is a Prerequisite to Enforcement Under Section 11 of the Clayton Act.

The language of the statute is unequivocal:

> "If such person fails or neglects to obey such order of the Commission * * * the Commission * * * may apply to the United States court of appeals * * * for the enforcement of its order, * * *".

There is no exception to this requirement. No other or different condition or procedure for enforcement is provided. Enforcement may be had only if the person against whom the order is issued fails or neglects to obey it.

The courts have relaxed the requirement of proof of actual violation to the natural and proper extent of holding that enforcement will be granted, as well, upon evidence that violation of the order is presently threatened. One

who plans to violate is neglecting to obey. And, of course, where non-compliance has been admitted by failure to deny and enforcement has not been opposed, injunctions have issued without affirmative proof of violation. The courts of appeals have consistently adhered to the statutory requirement in cases where enforcement has been opposed on the ground that the order was complied with.

There is no magic in the term "enforcement". Until a person against whom an order is issued violates it or threatens to violate it there is nothing to be enforced. The Commission has no need or occasion to seek the aid of the court for enforcement so long as there is no threat of non-compliance, and that is equally true whether the respondent does or does not exercise its right to a judicial review of the order's validity. Injunctions are not issued for convenience merely because the parties are before the court.

We submit that in Section 11 of the Clayton Act Congress used the term "enforcement" it this ordinary sense.[2] The statute evidently was enacted upon the assumption that Federal Trade Commission orders would in the great majority of cases be respected and complied with; and that only when the respondent is violating or threatening to violate the order is the court to be called upon to enforce. As stated by the court of appeals in *Federal Trade*

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[2] In certain later statutes, reflecting the modern development of administrative law, the term has acquired a more technical significance. For example, in the National Labor Relations Act, "enforcement" refers merely to the issuance of an injunction by the court upon application of the Board, without any requirement other than a valid order. There the evident intention was to impose immediate sanctions on violation regardless of any showing of present need for enforcement.

Comm. v. *Standard Education Society*, 14 F. 2d 947, 948 (7th Cir.):

> "It was the apparent intention of the Congress to give the practicer of the alleged unfair methods an opportunity to mend its way before subjecting it to a decree of the court, with its attending embarrassment. To accomplish this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed." (Italics the court's.)

So long as the respondent complies with the order it may go its way in peace; nor is it to be penalized for asserting in good faith its essential right to judicial review of the order's validity. Only when there is violation or threatened violation may the Commission sue for an injunction.

Where the Commission applies originally for an injunction the procedure provided and customarily followed is simple. The Commission files a petition in the court of appeals setting forth its order, alleging that the respondent has failed or neglected to comply, and praying that an injunction issue. A transcript of the record is certified and filed. The Court thereupon obtains jurisdiction of the proceeding (*Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105), and is empowered to enter a decree affirming, modifying or setting aside the order, and to enjoin violation subject to the limitations of the statute. The respondent may admit non-compliance and contest only the validity of the order, or it may concede validity and contest only the charge of violation, or it may contest both issues. Where both issues are contested the procedure in most of the circuits has been to consider first the validity of the order and then, where there is affirmance,

to refer the question of violation to the Commission as a master for hearing and report.[3]

This procedure was followed in the following cases:

Federal Trade Comm. v. *Standard Education Society*, 14 F. 2d 947 (7th Cir., 1926);
Federal Trade Comm. v. *Balme*, 23 F. 2d 615 (2nd Cir., 1928);
Federal Trade Comm. v. *Baltimore Paint & Color Works*, 41 F. 2d 474 (4th Cir., 1930);
Federal Trade Comm. v. *Herzog*, 150 F. 2d 450 (2nd Cir., 1945);
Federal Trade Comm. v. *Weiss*, 2nd Cir., 1945 (unreported);
Federal Trade Comm. v. *Standard Brands Inc.*, 189 F. 2d 510 (2nd Cir., 1951);
Federal Trade Comm. v. *Whitney & Co.*, 192 F. 2d 746 (9th Cir., 1951).

There are no cases to the contrary.

As recently as November 1951 the Court of Appeals for the Ninth Circuit, in a proceeding upon application for enforcement wherein the validity of the order was not challenged, nevertheless referred the case to the Commission for a hearing and findings on the issue of non-compliance. The court stated:

> "The Commission is * * * entitled to an affirmance of the order. However, on the issue raised by their answer—whether or not they have failed or neglected to obey the order—Whitney & Company and O'Brien

[3] In the Seventh Circuit the court first refers the case for determination of the question of violation, before proceeding to pass upon the merits of the order. *Federal Trade Comm.* v. *Standard Education Society*, 14 F. 2d 947.

are entitled to a hearing, with an opportunity to submit evidence." *F. T. C.* v. *Whitney & Co.*, 192 F. 2d 746.

In the *Standard Brands* case in the Second Circuit (189 F. 2d 510 (1951)) the Commission applied for enforcement of an order containing four clauses. Prior to filing its petition the Commission held hearings on the question of violation and submitted its findings to the court (a procedure not theretofore followed). The court decided to accept these findings "as if the Commission had been appointed our master". As to clause (1) of the order the Commission found no violation and did not request enforcement. As to clause (2) the court found that the evidence did not support the Commission's finding of violation and denied enforcement. It found that clause (3) had been violated for a short time but that the violation had ceased thereafter; the *order* having been violated, enforcement of this clause was granted, in spite of the subsequent discontinuance.

There has been no "changing trend" in the decisions.

Of course, where non-compliance affirmatively appears, or is not denied, a hearing on the question of violation is unnecessary. "If, as here, it is fairly apparent that the order has not been obeyed, and the answer of the respondent fails to assert compliance, a decree of enforcement is justified." *Federal Trade Comm.* v. *Wallace*, 75 F. 2d 733 (8th Cir., 1935). To the same effect, *Federal Trade Comm.* v. *Morrissey*, 47 F. 2d 101 (7th Cir., 1931). Cases wherein injunctions have been granted on petition of the Commis-

sion, upon affirmance of the order, in the absence of a denial of the allegation of non-compliance, are numerous.[4]

Section 11 of the Clayton Act also provides for the essential right of judicial review. A party against whom a cease and desist order is issued may obtain review "by filing in the court a written petition praying that the order * * * be set aside". Upon such a petition the court has "the same jurisdiction to affirm, set aside, or modify the order * * * as in the case of an application by the Commission * * * for the enforcement of its order".

When a petition for review is filed the Commission may, and frequently does, file a cross-petition for enforcement charging that the respondent has violated the order. If the charge of violation is denied, then both issues—validity and compliance—are presented exactly as in a case arising upon an original petition for enforcement. The jurisdiction of the court is the same in both cases, and its exercise is governed by the same statutory provisions. There is nothing whatever in Section 11 to the effect that different considerations are to be applied by the court in determining whether to grant an injunction upon a cross-petition than upon an original petition. The character of the application is the same in either case; and, like a counterclaim in a law suit, the same proof is required to sustain it as if it were the subject of a separate proceeding.

The question of affirmance and the question of enforcement are separate and distinct. The one depends upon the validity of the order, in whole or in part, when issued.

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[4] See, for example, *F.T.C.* v. *Good-Grape Co.*, 45 F. 2d 70 (6th Cir., 1930); *F.T.C.* v. *Army & Navy Trading Co.*, 88 F. 2d 776 (Ct. of Appeals, D. C., 1937); *F.T.C.* v. *Real Products Corp.*, 90 F. 2d 617 (2nd Cir., 1937); *F.T.C.* v. *Martoccio Co.*, 87 F. 2d 561 (8th Cir., 1937).

The other, under this statute, depends upon whether the person against whom the order was issued has failed or neglected to obey it. Exercise of the right to review presents only the issue of the order's validity, and the question of enforcement does not arise unless the Commission applies therefor. The distinct nature of the two remedies is apparent when it is considered that the jurisdiction to affirm, modify or set aside is appellate in nature, whereas enforcement is an exercise of the court's original equity power to enjoin.[5]

This Court has held that a petition for review of a cease and desist order of the Commission invokes only the appellate jurisdiction of the court of appeals. In *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623-4, the Court said:

> "It [the Commission] has not been delegated the authority of a court of equity. And a circuit court of appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The issuance of an injunction, however, obviously is an exercise of original jurisdiction. The constraint imposed by its decree is the constraint of the court, not of the Com-

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[5] Refusing to distinguish between enforcement and review, the Commission has reached contradictory conclusions on this point. In the court below it asserted "the jurisdiction of the court is original and exclusive and not appellate, and is purely statutory" (R. 111). In its brief here it states "we submit, however, that the jurisdiction involved is clearly not original. It is rather a 'special statutory jurisdiction'" (Br., p. 27).

mission; and the court alone may punish for contempt. Upon an application for enforcement, the Commission is in the position of a suitor for an injunction against violation of its order.

The distinction between review and affirmance, and the difference in the two judicial functions, was pointed out by the Court of Appeals for the Seventh Circuit in *Federal Trade Comm.* v. *Fairyfoot Products Co.*, 94. F. 2d 844 (1938):

> "Under the terms of the Federal Trade Commission Act, as amended, 15 U. S. C. A., § 41, et seq., the Circuit Court of Appeals possesses a two-fold function. At the request of one against whom the 'cease and desist' order has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. * * *
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> "Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.' * * *
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> "The necessary conclusion from the decisions of this circuit, and we believe from a proper construction of section 5, is that a general order of affirmance is not

> equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the 'cease and desist' order has been issued.
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> "Nothing that has been said in this opinion is intended to question, or restrict, the wide discretion of the Circuit Court of Appeals to determine in one proceeding the various questions which section 5 authorizes the aggrieved party and the Commission to present to the Circuit Court of Appeals."

The question whether evidence of failure or neglect to obey an order of the Commission is a statutory prerequisite to enforcement under Section 11 of the Clayton Act (or Section 5 of the Federal Trade Commission Act prior to 1938) appears never to have been directly presented to this Court. However, this Court has held that the right to judicial review of such an order is a substantial right, apart from the order's enforcement, and has indicated that enforcement may be had only in case of disobedience.

In *Federal Trade Comm.* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938), the Goodyear Company asserted that it had discontinued the price discriminations found and conceded that such discrimination was unlawful under the Robinson-Patman amendment, enacted after the order's issuance. This Court held that Goodyear nevertheless was entitled to an adjudication of whether the discriminations prohibited were in violation of the prior law, stating (pp. 259, 260):

> "* * * *In case of failure to obey its order*, the Commission may apply to the Circuit Court of Appeals for enforcement. And anyone required to cease and

> desist from a violation charged may seek review in the Circuit Court of Appeals, praying that the order be set aside. * * *
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> "The Commission, reciting its findings and the conclusion that respondent had violated the act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. * * * As a continuing order, the Commission may take proceedings for its enforcement *if it is disobeyed.* But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid." (Italics supplied.)

The *Goodyear* case is a complete answer to the Commission's contention that affirmance without enforcement presents only an abstract question and "would lead to the issuance of merely advisory opinions" (Br., p. 26).

The Commission places some reliance on the language of this Court's opinion in *Federal Trade Comm.* v. *Standard Education Society,* 302 U. S. 112, rehearing den. 302 U. S. 779. The question of enforcement had not there been presented, either in the court of appeals or by petition for certiorari. In considering the validity of the order this Court stated that certain clauses held invalid by the court below "should be sustained and enforced". By petition for rehearing the respondent pointed out that the issue of violation was pending in the court of appeals and that enforcement should not be directed until that issue was determined; but we think this Court's denial of rehearing may be regarded simply as a refusal to decide a question not properly before it.

The question whether enforcement should be granted upon affirmance on review without a showing of actual or

threatened non-compliance was squarely presented nearly thirty years ago in *L. B. Silver Co.* v. *Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923). A petition for review was there filed by the Silver Company. The court affirmed the order with modifications; and the Commission then moved for recall of the mandate and for entry of a decree enjoining violation of the order insofar as affirmed. The court stated:

> "It does not necessarily follow that the court should take the same action upon a petition for a respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for that purpose. * * *
>
> "We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.
>
> "* * * In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company so continued that there would have been any basis for a proceeding by the Commission to enforce its order, * * *. The situation, then, is that, as to the only substantial respect in

> which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved, the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction."

It is, of course, true that on a cross-petition for enforcement, as well as on an original petition, an injunction will be granted if the charge of non-compliance is not denied and enforcement is not opposed. All but one of the cases cited in the first two paragraphs of footnote 12 in the Commission's brief (pp. 26-27) are of that character; and the same is true of all the cases relied on by Judge Clark.[6] These cases are not determinative of the question presented here, which is whether enforcement should be granted upon affirmance without a showing of non-compliance *where a factual issue as to compliance is presented.*

In a case where that question *was* presented (upon a petition for enforcement by the Commission) the Court denied an injunction, stating:

> "If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the Commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the Commission while the same is in effect' that

[6] Four cases are cited by Judge Clark, and also by the Commission, as instances of enforcement where no cross-petition was filed. *In all four cases a formal cross-petition was in fact filed alleging non-compliance, and the charge was not denied.*

> petition has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory. If the allegation such as heretofore quoted from the petition be a necessary one, it follows that *such allegation, together with respondent's denial, presents an issue of fact necessarily determinable before this court can or should act upon the merits of the application.*
>
> "Petitioner's contention that the determination of this issue will unduly postpone the enforcement of its order is an argument that should be addressed to Congress rather than to this court. * * *". *Federal Trade Comm.* v. *Standard Education Society*, 14 F. 2d 947, 948. (Italics supplied.)

We submit that exactly the same considerations apply where the application for enforcement is made in a proceeding initiated by a petition for review.

To be sure, where an order is affirmed on petition for review and the Commission asks an injunction, the person ordered to cease and desist may not resist enforcement without denying violation of the order, and thereby throw upon the Commission the burden of coming forward with affirmative proof of such violation. *Automatic Canteen Co.* v. *Federal Trade Comm.* (7th Cir., January 18, 1952); *Electro Thermal Co.* v. *Federal Trade Comm.*, 91 F. 2d 477 (9th Cir., 1937). Even an informal request for enforcement presumably is made pursuant to the statute and perhaps implies a charge of non-compliance sufficiently to require denial. Obviously no hearing is required where the factual issue is not raised. Here compliance *was* asserted, and the Commission offered no evidence of actual or threatened violation.

The statement that the "almost unvarying judicial practice has been to order enforcement upon affirmance", is contrary to the fact. That statement does not appear to be true even if cases where the issue of violation was not raised are included. In cases too numerous for citation (most of them arising under Section 5 of the Federal Trade Commission Act prior to 1938) the Commission's orders appear to have been affirmed upon petition for review without enforcement.[7]

The Commission cites two decisions of this Court in support of its claim that the courts have regularly enjoined violation of orders upheld on petition for review without a showing of non-compliance: *Federal Trade Comm.* v. *Cement Institute*, 333 U. S. 683; and *Federal Trade Comm.* v. *A. E. Staley Co.*, 324 U. S. 746. In each of these cases continuation of the unlawful practice pending review was admitted and well known to the Court. In the *Cement* case the principal charge was conspiracy in violation of the Federal Trade Commission Act, although there was a subsidiary charge of Clayton Act violation. Under the former Act (as amended) the court had no discretion as

[7] E.g., see *Aluminum Co. of Amer.* v. *F.T.C.*, 284 Fed. 401 (3rd Cir., 1922); *Hills Bros.* v. *F.T.C.*, 9 F. 2d 481 (9th Cir., 1926); *Cream of Wheat Co.* v. *F.T.C.*, 14 F. 2d 40 (8th Cir., 1926); *International Shoe Co.* v. *F.T.C.*, 29 F. 2d 518 (1st Cir., 1928); *Fluegelman & Co.* v. *F.T.C.*, 37 F. 2d 59 (2nd Cir., 1930); *Shakespeare Co.* v. *F.T.C.*, 50 F. 2d 758 (6th Cir., 1931); *Marietta Mfg. Co.* v. *F.T.C.*, 50 F. 2d 641 (7th Cir., 1931); *Consolidated Book Publishers, Inc.* v. *F.T.C.*, 53 F. 2d 942 (7th Cir., 1931); *Butterick Publishing Co.* v. *F.T.C.*, 85 F. 2d 522 (2nd Cir., 1936); *Chicago Silk Co.* v. *F.T.C.*, 90 F. 2d 689 (7th Cir., 1937). In a number of these cases the Commission requested at the close of its brief that a decree of enforcement be issued. It is possible that in some of such cases an injunctive decree was submitted by the Commission and entered without opposition. If so, this does not appear from the official reports. Many other similar cases might be cited.

to enforcement. Furthermore, the continued use of the multiple basing point system by the cement companies until the case reached this Court was common knowledge. In the *Staley* case, the Commission filed a cross-petition for enforcement in the court of appeals, alleging that Staley had failed and neglected to obey the order, and this charge was not denied. It thus appears that in each of these cases this Court directed enforcement upon evidence of actual violation of the order upheld.

In one case (not cited by the Commission) enforcement was granted after affirmance upon petition for review, in spite of an assertion that the order had been complied with. *National Silver Co.* v. *Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937). The court held that since the petitioner was insisting that it had the right to continue the "misleading designation" of its merchandise, it was the duty of the Court to "affirm and enforce" the order. That case merely emphasizes the discretion vested in the court of appeals, upon an application for enforcement, to determine whether there is a sufficient present threat of violation to justify an injunction.[8]

There is no question here of this proceeding being moot. The order, and the decree affirming it, remain in full force and effect, and enforcement, if the occasion arises, will have been expedited by the prior adjudication of its validity. The significance of petitioner's claim of prior abandonment is only to confirm its assertion that it has complied with the order and is not threatening violation.

[8] Apparently to the same effect, see *Corn Products Refining Co.* v. *F.T.C.*, 144 F. 2d 211, 220, where compliance with one clause of the order was asserted and there is a dictum that proof of "mere discontinuance" would not justify a refusal to enforce.

If a factual issue had been presented, both parties would have been entitled to a hearing to provide the necessary factual basis for action by the court upon the request for an injunction. Here, the Commission did not ask a hearing, and takes the position that compliance is immaterial.

The courts have properly distinguished between discontinuance of the prohibited practice prior to, and after, the issuance of the order. In the following cases arising upon petition for review the petitioner asserted that all or a part of the practices found unlawful had been abandoned prior to the issuance of the order. The court affirmed, but did not enforce:

Sears, Roebuck & Co. v. *Federal Trade Comm.*, 258 Fed. 307 (7th Cir., 1919);

Guarantee Veterinary Co. v. *Federal Trade Comm.*, 285 Fed. 853 (2nd Cir., 1922);

Fox Film Corp. v. *Federal Trade Comm.*, 296 Fed. 353 (2nd Cir., 1924);

Chamber of Commerce of Minneapolis v. *Federal Trade Comm.*, 13 F. 2d 673 (8th Cir., 1926);

Arkansas Wholesale Grocers Association v. *Federal Trade Comm.*, 18 F. 2d 866 (8th Cir., 1927);

Armand Co. v. *Federal Trade Comm.*, 78 F. 2d 707 (2nd Cir., 1935);

Fairyfoot Products Co. v. *Federal Trade Comm.*, 80 F. 2d 684 (7th Cir., 1935).

In *Chamber of Commerce of Minneapolis* v. *Federal Trade Comm., supra*, the Chamber contended that there was no basis for a cease and desist order as to certain practices which it claimed it had ceased long prior thereto. The Court said (pp. 686-7):

> "However, this is not of itself sufficient to vacate that part of the order although it might be reason for refusing, without prejudice, an application for the enforcement thereof at this time."

In two cases it has been held that abandonment of the unlawful practice some time *after* the issuance of the order, but prior to the application for enforcement, is no ground for denying an injunction. *Federal Trade Comm.* v. *Wallace*, 75 F. 2d 733 (8th Cir., 1935); *Federal Trade Comm.* v. *Standard Brands Inc.*, 189 F. 2d 510 (2nd Cir., 1951).

At page 16 of the Commission's brief we find the surprising statement that the statutory provision "if such person fails or neglects to obey such order" is a "directive to the Commission as to the circumstances under which it may go into court to seek enforcement", but that "it cannot properly be read as imposing a condition which a court must find to be satisfied before it can grant enforcement". The position seems to be that while non-compliance is a condition precedent to an *application* for enforcement, the Court may act upon the application without concerning itself as to whether the condition has been satisfied. No case is cited in support of such a construction.

Similar conditions making the right of an administrative agency to apply for an injunction or issue an order dependent on a showing of present or immediately threatened violation have been contained in other acts and have been construed strictly where the wording of the statute is clear.

Securities and Exchange Comm. v. *Torr*, 87 F. 2d 446 (2nd Cir., 1937) was an appeal by the S. E. C. from an order granting a preliminary injunction against violation of

the Securities and Securities Exchange Acts. Section 21(e) of the latter act (15 U. S. C. 78u(e)) provided that "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of this chapter, * * * it may * * * bring an action * * * to enjoin such acts or practices, * * *". The court held that under this section proof of present or threatened violation was necessary to support an injunction, and that evidence of past violation was not sufficient, stating (p. 450):

> "As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear. *S. E. C.* v. *Jones*, 85 F. 2d 17. But, when such statutory prerequisites are alone relied on, the unambiguous language of the statute is to be given its effect. *Cutten* v. *Wallace*, 80 F. 2d 140. That language in this instance conditions the right upon sufficient proof that 'any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation' of the statute.
>
> "As the appellants were not engaging in any such acts or practices and the circumstances fail to support any reasonable inference that they were about to engage in any at the time the suit was brought or at the time the injunction was made effective, we are constrained to hold that it was improvidently granted."

In *Cutten* v. *Wallace*, 80 F. 2d 140 (7th Cir., 1935) a similar question arose under the Grain Futures Act of 1922. That Act provided that "If the Secretary of Agriculture has reason to believe that any person is violating

any of the provisions of this Act", he may serve a complaint stating his charges, and "upon evidence received" the Commission created by the Act may require all contract markets to refuse such person trading privileges. The Commission argued that although the statute used the present tense it should be so construed as to include past transactions; that without such a construction the power to deal with an offender was practically nil. The court cited the rule that "Where there is no ambiguity in words of statute there is no room for statutory construction", and stated (pp. 142-3):

> "We are, however, required to construe the statute,—not to pass upon its purposes, but upon its wording. * * * We are not * * * persuaded that the words of the statute here used can or should be so stretched as to include past violations which were committed and completed two years before the complaint was filed."

This Court unanimously affirmed. *Wallace* v. *Cutten*, 298 U. S. 229.

This case created no conflict, and is in accord, with the prior decisions of the courts of appeals on the question here presented. We doubt that this Court would have granted certiorari had it not been for the appearance of conflict created by the opinion of the Court of Appeals for the Seventh Circuit in *Automatic Canteen Co.* v. *Federal Trade Comm.*, delivered January 18, 1952 while this Court was considering the petitions in this case. The *Automatic Canteen* case was initiated by petition for review and the Commission filed a cross-petition for enforcement. Without asserting compliance the Canteen Company argued that it was incumbent on the Commission to show that viola-

tion of the order had occurred or was imminent, citing the decision of the Second Circuit in the present case. The court granted enforcement, stating:

> "We regret that we cannot agree with the reasoning and conclusion of that eminent court in denying enforcement. We are in accord with the conclusion of Judge Clark, dissenting, and the reasons stated by him, that the court of appeals does have the jurisdiction and the duty to order enforcement on the cross petition of the Commission. * * *"

The decision reached was obviously correct. The court need only have pointed out that in the absence of any denial that the order has been violated the court is justified in assuming that the unlawful practice has continued. The decision in the present case evidently was misconstrued and the criticism of it was gratuitous. If read as meaning that it is the duty of the court, upon affirmance, to issue an injunction on cross-petition of the Commission without a finding of actual or threatened non-compliance, then the *Automatic Canteen* case, not this case, is in conflict with the prior decisions.

B. A Different Rule for Enforcement Upon a Cross-Application Than Upon an Original Application Would Lead to Unjust and Unreasonable Results, and Would Not Aid the Commission.

The Commission urges that even if evidence of non-compliance is a statutory prerequisite to the granting of an injunction upon original application of the Commission, different considerations should apply when the respondent petitions for review. Such a rule would penalize the respondent for exercising his judicial right of review and

would lead to unjust and unreasonable results. It would mean that a respondent desiring in good faith to comply with the law would be placed in the dilemma of having to choose between complying with an order of doubtful validity or testing it at the risk of having to do business thereafter under a court injunction; and the risk would be a certainty where, as here, only modification is sought.

The filing of a petition for review creates no additional reason or necessity for making enforcement mandatory. Affirmance establishes that violation of the order is a violation of the law and the effectiveness of the order is thereby increased; and the need for an injunction is correspondingly lessened. Continuation of the forbidden practice after a decree of affirmance is an invitation to triple damage suits which few business concerns care to risk.

When an order clearly valid is issued by the Commission the respondent need only comply with it, and so long as he complies an injunction will not issue against him. But suppose the order contains two clauses, one valid and the other of doubtful validity. The respondent complies with the first clause and does not challenge it, but petitions the court to review and set aside the second clause. Suppose, further, that the court finds the second clause invalid and strikes it from the order. Under the rule here proposed it would be the duty of the court, upon affirming the first clause, to enjoin its violation, even though the respondent did not question its validity, had fully complied, and had been forced to assume the burden and expense of coming to the court to have the invalid clause set aside.

Similarly, if the respondent named in the supposed order, while complying with the first clause, had chosen simply to ignore and violate the second clause, and the

Commission had then obtained evidence of the violation and petitioned for enforcement, the respondent could still have challenged the second clause and have had it set aside, but, in the absence of a charge and showing of non-compliance with the first clause an injunction against violation of that clause would not issue. (*Federal Trade Comm.* v. *Standard Brands Inc.*, 189 F.2d 510.)

Such results could not have been intended when Congress enacted Section 11 of the Clayton Act. Most business men desire to comply with the law and to know the conditions under which they can lawfully operate their businesses. The result of the rule here sought would be to place a premium on violation rather than review, and would add to the enforcement burden of both the Commission and the courts.

The Commission asserts that to make evidence of noncompliance a prerequisite for enforcement where the order is affirmed upon petition to review "would leave a party who had unsuccessfully challenged a Commission order on the merits free to continue to flout the judicially approved order". There are two answers to this. In the first place, in the cases (including the present case) where an injunction has been denied after affirmance upon review, the denial has been on the ground that the forbidden practice was discontinued before the issuance of the order and there were no facts indicating a threat of renewal. In such cases where the court finds no need for an injunction, there is no reason to assume that the court was wrong or that there will be any further necessity for enforcement. Judge Clark's dissent, and the Commission's entire argument here, seem to be based on the assumption that any person who ventures to challenge an order of the Commission must be presumed to be planning to violate it.

Secondly, denial of an injunction for lack of a showing of non-compliance when the issue is raised in a proceeding upon petition for review creates no different situation than exists when the Commission fails to establish violation after affirmance in a proceeding upon its original petition for enforcement. A construction making enforcement upon affirmance mandatory only in a proceeding initiated by petition for review would be of little benefit to the Commission. The attack here is upon the wisdom of the statute and should be made to Congress, not to this Court.

There is no basis for the Commission's repeated assertion that to require a showing of actual or threatened non-compliance in support of an application for enforcement in a review proceeding (where the issue is raised) will result in delaying and impeding enforcement. Quite the contrary is true. Review and affirmance does not delay and may facilitate enforcement.

In the present case, for example, nearly a year elapsed between the filing of a petition for review and the presentation of the case to the court. During that interval the Commission had ample opportunity to ascertain whether respondent was complying with the order. If it had obtained evidence of non-compliance the court undoubtedly would have received it, and the delays incident to the filing of an original petition would have been obviated. Without such evidence the Commission could not have applied for enforcement anyway.

Furthermore, where the Commission applies initially for enforcement, the court must determine two questions (1) the validity of the order, and (2) whether there has been non-compliance. In the present case, if the Commis-

sion should hereafter apply for enforcement, non-compliance will be the only issue, the validity of the order having already been passed upon. If the Commission is concerned about speedy enforcement of its orders it should be glad to have the question of affirmance decided and out of the way before occasion for enforcement arises.

There is a further and more important consideration. Section 11 of the Clayton Act places no limitation on the time for enforcement or review. When the Commission issues an order of doubtful validity or scope, the respondent has the choice of petitioning for review or adopting his own interpretation of the order until such time as the Commission applies for enforcement. Most respondents prefer to petition for review so as to obtain as promptly as possible an adjudication of what changes in their business practices are necessary for compliance. But if it should now be held that if the order is affirmed upon review an injunction will issue as a matter of course, the respondent would be better advised to ignore the order until the Commission can catch up with him and obtain evidence of violation. If the Commission applies for enforcement the respondent can then raise every question as to the validity of the order that could have been raised on petition for review, and he will in addition have the benefit of a judicial decision as to whether the specific practice charged constitutes a violation—a valuable right, and without any penalty if the charge of violation is upheld. The short cut now proposed would simply discourage respondents from seeking review and divert traffic from one channel to the other.

The Commission's principal and primary complaint in the past has been that it is required to allege and prove

non-compliance with its cease and desist orders before it can obtain an injunction upon its own application. It is now seeking to obtain a half loaf where only a whole loaf will suffice. For reasons above stated, the construction urged, if applied only in proceedings on petition for review, would make the enforcement procedure illogical and lopsided and probably would add to the enforcement burden of the Commission.

C. The Granting of an Injunction Where Non-Compliance Is Not Shown Is Discretionary. That Discretion Was Not Here Abused.

Section 11 of the Clayton Act contains no mandate to the court of appeals to issue an injunction in any case. The provision is that "if such person fails or neglects to obey such order" the Commission may *apply to the court* for enforcement of the order, and the court thereupon obtains *jurisdiction of the proceeding*. There is no other provision as to enforcement. It was evidently contemplated that the court should proceed in the exercise of its original equity jurisdiction in acting upon the application for an injunction.

As stated in *Federal Trade Comm.* v. *Fairyfoot Products Co.*, 94 F. 2d 844, 846 (7th Cir., 1938), with reference to old Section 5 of the Federal Trade Commission Act:

> "The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein."

This Court has held that much more positive statutory provisions do not divest the court of its discretion in deciding whether to enjoin violation of a statute or regulation. *Hecht Co.* v. *Bowles*, 321 U. S. 321. That was a suit by the price administrator for an injunction under the Emergency Price Control Act of 1942. The Act provided that "upon a showing by the administrator that such person has engaged or is about to engage in such acts or practices a permanent or temporary injunction, restraining order or other order shall be granted without bond". This Court said (p. 329):

> "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. * * * The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied".

Of course, where a violation of the order is shown or is not denied the courts have regularly granted a decree of enforcement upon affirmance (cases cited under sub-heading "A" of this Point). Issuance of an injunction upon such a showing or admission may be regarded as mandatory except in most unusual circumstances; at least a refusal to enforce in such a case would be an abuse of discretion. But when the person ordered to cease and desist asserts that he has complied with the order and shows that the practice forbidden was discontinued prior to its issu-

ance, the courts have denied an injunction when the Commission makes no showing that violation has in fact occurred or is threatened; and in the cases where a factual issue has been joined the practice has been to refer that issue for hearing and findings prior to decision.

Where the question has arisen on petition for review the courts of appeals have treated the application for enforcement as invoking the court's broad equity powers, to be exercised "upon the lines adopted by courts of equity generally in hearing suits for injunction".

L. B. Silver Co. v. *Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923);
Fairyfoot Products Co. v. *Federal Trade Comm.*, 80 F. 2d 684 (7th Cir., 1935); affirmance held not equivalent to enforcement, *Federal Trade Comm.* v. *Fairyfoot Products Co.*, 94 F. 2d 844;
Butterick Co. v. *Federal Trade Comm.*, 4 F. 2d 910 (2nd Cir., 1925).

Enforcement of the Clayton Act is not entrusted solely to the Federal Trade Commission. Section 15 of that Act vests the district courts with jurisdiction to prevent and restrain violations in proceedings in equity instituted under the direction of the Attorney General. The issuance of an injunction in such cases clearly is discretionary. On the other hand, the issuance of a cease and desist order by the Federal Trade Commission upon a finding of past violation is not discretionary. The remoteness of the violation or its prior abandonment are not material considerations in a hearing upon Commission complaint. This is because Section 11 provides that if upon such hearing the Commission is of the opinion that there has been a violation it *shall*

issue a cease and desist order. It may not be assumed, therefore, that in every case in which a cease and desist order is issued by the Commission an injunction would have been granted by the district court if suit had been brought there.

Here petitioner has had no opportunity to be heard on the question whether there is presently any sufficient threat of violation of this order to justify the exercise of the equity jurisdiction of the court. It is able to point to the testimony of its sales manager in 1946 only because he was called as a witness by the Commission and questioned to some extent about the company's current pricing practices. Whether such testimony clearly shows a termination of the 1941 discriminations prior to 1946 is not decisive of the question now presented, although we think the testimony does show that those discriminations had been abandoned.[9] The important point is that the Commission has no equity powers (*Federal Trade Comm.* v. *Eastman Kodak Co.*, 274 U. S. 619, 623) and therefore the issuance of a cease and desist order implies no finding of a threat of future violation sufficient to justify the issuance of an injunction by a court of equity. Particularly is this true where the application for an injunction reaches the Court ten years after the commission of the acts found unlawful and five years after the hearings on which the order is based.

We submit, therefore, that where, as here, compliance with the order is asserted and there is no charge of non-compliance, an injunction may not properly be granted

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[9] Mr. O'Leary testified that Ruberoid was then selling to only five customers, that they all got the same discounts regardless of quantity, and that "they get this discount whether they are wholesalers or applicators" (R. 20).

without affording the person against whom it is sought an opportunity to be heard on the question whether *the facts existing at the time the application is made* justify injunctive relief. Here the Court found "uncontradicted evidence" of prior abandonment in the record, and the Commission, while questioning that finding, offered no showing that the discriminations had thereafter been continued or resumed.

> "A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. * * * The remedy is never afforded on suspicion or on the ungrounded fear that the offense may be repeated in the future." (*Walling, Administrator* v. *Buettner & Co.*, 133 F. 2d 306, 308 (7th Cir., 1943).)
>
> "Even when the plaintiff is the United States or one of its administrative agencies, and the suit is therefore brought in the public interest, or at least in the interest of a class, there must be some tangible probability that the wrong will be repeated to justify an injunction". (*Ring* v. *Authors' League of America*, 186 F. 2d 637, 642 (2nd Cir., 1950).)

Even Judge Clark, in his dissent below, admitted that the court had a choice in the matter of granting an injunction. Having obtained a favorable opinion, even though a dissent, the Commission has deemed it opportune to present the question to this Court in a case otherwise woefully weak both as to the merits of the order and as to the need for enforcement. If it be accepted that the court below had discretion to refuse enforcement, then certainly that discretion was not abused.

Conclusion.

The case should be remanded to the court of appeals with direction to modify the order to cease and desist in the respects requested in Points I and II of this brief. The Commission's prayer for enforcement should be denied without prejudice.

Respectfully submitted,

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March, 1952.

Appendix 1.

Sections 2(a) and 2(b) of the Clayton Act, as Amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A., sec. 13).

Sec. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods of quantities in which such commodities are to such purchasers sold or delivered: * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the *prima facie* case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That

nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 11 of the Clayton Act (Act of October 15, 1914, 38 Stat. 734; 15 U. S. C. A., sec. 21).

* * * * * *

Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right [735] to appear at the place and time so fixed and show cause why an order should not be entered by the commission, authority, or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission, authority, or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission, authority, or board. If upon such hearing the commission, authority, or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been

or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *.

If such person fails or neglects to obey such order of the commission, authority, or board while the same is in effect, the commission, authority, or board may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board. Upon such filing of the application and transcript the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, authority, or board. The findings of the commission, authority, or board as to the facts, is supported by testimony, shall be conclusive. * * * The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission, authority, or board to cease and desist from a violation

charged may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forth [736] with shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the Court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission, authority, or board as in the case of an application by the commission, authority, or board for the enforcement of its order, and the findings of the commission, authority, or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission, authority, or board shall be exclusive.

Appendix 2.

Following are the pertinent provisions of cease and desist orders issued by the Federal Trade Commission against respondents charged with discriminating in price between competing purchasers in violation of Section 2(a) of the Clayton Act, from 1944 to June, 1950.

Provisions limiting the prohibitions of the order to differentials found to have or which may have a substantial adverse effect on competition are printed in bold face type. Provisions excepting or exempting differentials making only due allowance for differences in seller's costs are printed in italics.

Matter of National Biscuit Company, 38 F. T. C. 213, 222 (Feb., 1944)

"IT IS ORDERED that the respondent * * * do forthwith cease and desist:

"1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom **in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.**

"2. From continuing or resuming the discriminations in price **referred to and described in paragraph four of the aforesaid findings as to the facts.**

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, **in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts;** or in any other manner resulting in price discriminations **sub-**

stantially equal in amount to the aforesaid discriminations, *except as permitted by Section 2 of the Clayton Act as amended.*"

Matter of American Art Clay Co., 38 F. T. C. 463, 468 (May, 1944)

"IT IS ORDERED, That the respondent * * * do forthwith cease and desist:

"1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and granting discounts therefrom **in the manner and under the circumstances found in paragraph 5 of the aforesaid findings as to the facts and conclusions.**

"2. From continuing or resuming the discrimination in price **referred to and described in paragraph 5 of the Commission's findings as to the facts herein.**

"3. From otherwise discriminating in price between purchasers of crayons [etc.] **in a manner and degree substantially similar to the manner and degree of the discrimination referred to in paragraph 5 of the Commission's findings as to the facts herein,** and in any other manner resulting in price discriminations **substantially equal in amount to such discriminations** *except as permitted by Section 2 of the Clayton Act, as amended.*"

Matter of Morton Salt Co., 40 F. T. C. 388, 398 (April, 1945)

"IT IS ORDERED that respondent * * * do forthwith cease and desist from discriminating directly or indirectly in the price of such products of like grade and quality as among wholesale or retail dealers purchasing said salt

when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered,

> "(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; **provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.**
>
> "(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; **provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers."**

Matter of Booth Fisheries Corporation, 40 F. T. C. 690, 695 (June, 1945)

"IT IS ORDERED that the respondent * * * do forthwith cease and desist from discriminating, directly or indirectly in the price of such fish products of like grade and quality as among purchasers *when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such fish products are sold or delivered* * * *:

> "1. By selling such fish products to some customers at prices different from the prices charged other customers who in fact compete in the sale and dis-

tribution of such fish products **when the effect of such differences in price may be substantially to lessen competition or to injure, destroy, or prevent competition among such customers."**

Matter of John B. Stetson Company, 41 F. T. C. 244, 254 (Oct., 1945)

"IT IS ORDERED that respondent * * * do forthwith cease and desist:

"(1) From selling such products of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom **in the manner and under the circumstances found in Paragraph Five of the aforesaid findings as to the facts.**

"(2) From continuing or resuming the discriminations in price **referred to and described in Paragraph Five of the aforesaid findings as to the facts.**

"(3) From otherwise discriminating in price between purchasers of men's hats of like grade and quality in any manner or degree **substantially similar to the manner and degree of the discriminations referred to in Paragraphs Four, Five and Six of the aforesaid findings as to the facts, or in any other manner resulting in price discriminations substantially equal in amount to the aforesaid discriminations,** ***except as permitted by Section 2 of the Clayton Act as amended.***"

Matter of Ferro Enamel Corporation, et al., 42 F. T. C. 36, 55 (Feb., 1946)

"III. IT IS FURTHER ORDERED that the corporate respondents * * * do forthwith cease and desist from:

Appendix 2

"1. Directly or indirectly discriminating in price between different purchasers of 'frit' of like grade and quality **in the manner and degree set forth in the volume discount schedule shown in Paragraph Five of the findings as to the facts herein, or in any manner or degree substantially similar thereto,** or from continuing or resuming any such discriminations in price.

"2. Directly or indirectly discriminating in price in any other manner between purchasers of 'frit' of like grade and quality, **when such discriminations substantially equal or exceed any of the discriminations shown in the volume discount schedule set forth in Paragraph Five of the findings as to the facts herein.**

"3. Otherwise discriminating in price between purchasers of 'frit' of like grade and quality **where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination;** provided, that this shall not *prevent price differences which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which said 'frit' is to such purchasers sold or delivered,* and provided further, that this shall not prevent respondents from showing that any lower price to any purchaser was made in good faith to meet an equally low price of a competitor."

Matter of The Curtiss Candy Company, 44 F. T. C. 237, 275 (Nov., 1947)

"II. It is further ordered that the respondent • • • do forthwith cease and desist from discriminating, directly

or indirectly, in the price of such products of like grade and quality as among purchasers *when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered:*

"1. By selling such products to some vending-machine operators at prices different from the prices charged other vending-machine operators who in fact compete in the sale and distribution of such products, **provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such vending-machine operators** or between respondent and its competitors.

"2. By selling such products to some wholesalers or jobbers thereof at prices different from the prices charged other wholesalers or jobbers who in fact compete in the sale and distribution of such products, **provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such wholesalers or jobbers** or between respondent and its competitors.

"3. By selling such products to some retailers thereof at prices different from prices charged other retailers who in fact compete in the sale and distribution of such products, **provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such retailers** or between respondent and its competitors."

Appendix 2

Matter of Standard Oil Company, 43 F. T. C. 56 (August, 1946)

"IT IS ORDERED that the respondent * * * do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers:

"1. By selling such gasoline to competing purchasers at different prices **in the manner and under the circumstances stated in the findings as to the facts herein.**

* * * * *

"3. By otherwise discriminating in price between purchasers of such gasoline **in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein.**

"4. By selling such gasoline to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with them in the sale and distribution of such gasoline.

"5. By allowing a price to any dealer, jobber or wholesaler on such gasoline sold by such dealer, jobber or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing capacity.

* * * * *

"The above specified requirements of this order are subject, however, to the following provisos:

"**(a) That none of the prohibitions of the order shall be taken as inhibiting any price differentials by re-**

spondent that were not found under the facts herein to have a tendency to injure, destroy or prevent competition with respondent's customers receiving the benefit of such differentials or with their customers.

"(b) *That none of the prohibitions of the order shall be taken as preventing any price differentials by respondent which make only due allowance for differences in respondent's cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.*"

Matter of Minneapolis-Honeywell Regulator Company, 44 F. T. C. 351, 389 (Jan., 1948)

"III. It is FURTHER ORDERED that respondent * * * do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—

"1. By selling such controls to some oil-burner manufacturers at prices **materially different** from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, *when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered.*"

Matter of Walter H. Johnson Candy Company, 44 F. T. C. 1021 (June, 1948)

"It is ORDERED that respondent * * * do forthwith cease and desist from discriminating, directly or indirectly,

in the price of such products of like grade and quality as among purchasers *when the differences in price are not justified by differences in the cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which said products are sold or delivered:*

> "1. By selling such products so some vending machine operators at prices differing from the prices charged other vending machine operators who in fact compete in the sale and distribution of such products in the same trade areas."

Matter of Jacques Kreisler Manufacturing Corporation, F. T. C. Docket No. 5446 (Aug., 1948)

"IT IS ORDERED that respondent * * * do forthwith cease and desist from:

> "Directly or indirectly discriminating in price by charging, accepting, or receiving from different purchasers of jewelry products of like grade and quality **net prices which differ as much as, or more than, 2½ percent of the highest of such net prices;** *provided, however, that the foregoing shall not be construed to prevent respondents from defending any alleged violation of this order by showing that different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered."*

Matter of F. & V. Manufacturing Company, Inc., 60 F. T. C. Docket No. 5579 (March, 1950)

"IT IS ORDERED that respondent * * * do forthwith cease and desist from:

> "Directly or indirectly discriminating in the price of jewelry products by charging, accepting, or re-

ceiving from different purchasers of such products of like grade and quality **net prices which differ as much as, or more than, 10 percent of the highest of such net prices**; *Provided, however, that the foregoing shall not be construed to prevent the respondent from defending any alleged violation of this order by showing that different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered.*"

Matter of United States Rubber Company, 69 F. T. C. (June, 1950)

"IT IS ORDERED that respondent * * * do forthwith cease and desist from directly or indirectly discriminating in the price of waterproof or canvas footwear by charging or receiving from different purchasers of such products of like grade and quality **net prices which differ as much as, or more than, 2 percent of the highest of such net prices**; *Provided, however, that the foregoing shall not be construed to prevent the respondent from defending any alleged violation of this order by showing that the different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered.*"

Petition For Writ of Certio-rari

IN THE

Supreme Court of the United States

October Term, 1951

No. 448 504

THE RUBEROID CO.,
Petitioner,

against

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 448

THE RUBEROID CO.,
Petitioner,
against
FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Ruberoid Co., prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the final decree of that court filed September 5, 1951 in a cause bearing the above caption, affirming a cease and desist order of the Federal Trade Commission issued January 20, 1950. This petition is directed to the merits of the order affirmed, and is in the nature of a cross petition to the petition for certiorari filed by the Solicitor General on November 26, 1951, asking review only of the omission from the decree below of an enforcement provision enjoining violation of the Commission's said order. Petitioner accepts and relies on the certified transcript of the record in this cause heretofore filed in this Court by the Solicitor General.

The Matter Involved: Background and Scope of This Petition.

The Commission's order was issued in a proceeding upon complaint, issued in 1943, charging petitioner with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (R. 2). The charge was that petitioner had granted certain trade discounts to some purchasers of its roofing materials, not allowed to other competing purchasers. Hearings were not held until after the War in 1946. The Commission introduced testimony and invoices showing that during the year 1941, in New Orleans, La., petitioner had allowed a discount of 5%, and in some cases 7½%, to four customers functioning as applicators (roofing contractors) or as retailers, which discounts were not allowed certain competing applicators and retailers. There is no evidence of discrimination at any other time or place. It appeared that the allowance of these 1941 discounts resulted from competitive conditions local to New Orleans, that petitioner's pricing policy there was not indicative of its pricing elsewhere, and that prior to 1946 the discriminations proved had been eliminated either by adoption of a one-price policy or by observance of functional competitive levels (R. 31-36).

Petitioner did not dispute that these local 1941 discriminations had occurred, nor did it attempt to justify them under the statute. The defense of meeting competition was pleaded, but was not pressed, since the Commission had held in the Standard Oil case in 1945, a few months before these hearings, that that defense was not available in this type of case (41 F. T. C. 263). Proposed findings and conclusions were agreed upon, except as to one point, between the opposing attorneys, and were submitted to and adopted by the trial examiner (R. 101-109). The sole point of dis-

pute was whether the evidence established discrimination in price between wholesalers, and on this point the Commission upheld petitioner (R. 140, fol. 420). After briefs and argument (turning principally on the scope of the order to be issued) the Commission issued its findings and a cease and desist order which prohibits petitioner from discriminating in price in the sale of its roofing materials

> "By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

This order is plainly invalid on its face. It explicitly prohibits any differential, however small, in the prices charged purchasers competitively engaged in the resale of roofing materials at any level of competition, without exception or proviso. It is not indefinite or ambiguous and does not require construction. It applies to petitioner's entire nation-wide business. There is no exemption of differentials which make only due allowance for differences in petitioner's costs, or of differentials resulting from a lower price made in good faith to meet competition. Such differentials are permitted by the Act but forbidden by this order. Furthermore, the Commission made no finding as to what differentials might substantially affect competition between wholesalers or manufacturers in the resale or distribution of petitioner's products; yet this order prohibits any differential whatever between competing wholesalers or between competing manufacturers. An order which expressly prohibits what the Act expressly permits cannot be valid and should not stand.

Petitioner duly petitioned the Court of Appeals for review and modification, asking that the differentials prohibited be limited to those found by the Commission to be

unlawful, and to those which are unlawful under the Act. Petitioner did not contest the Commission's findings of fact. It took the position there, and asserts here, that the order is invalid as a matter of law, in that it prohibits future differentials which were not found unlawful and which would at most be prima facie unlawful under the statute, without exception or proviso affording petitioner an opportunity to justify or defend them if charged with violation.

This is not a case where the order prohibits other *unlawful* acts reasonably related to those found unlawful, or practices lawful in themselves found to have been used for an unlawful purpose. It is not and cannot be contended that the Commission is justified, as a matter of remedy, in prohibiting *all* differentials in order to reach those which the statute declares unlawful.

The Commission conceded that it never before had issued an order like this one, or at least that no similar order issued under the Clayton Act has previously reached the courts. During its fifteen years' administration of the Robinson-Patman Act the Commission's orders under Section 2(a) have consistently included an exception or proviso permitting differentials justified by cost differences, and many orders have contained a proviso exempting differentials made in good faith to meet competition. No court has ever stricken or frowned upon such an exception or proviso. The Commission stated in its brief below that this case "represents another milestone in the Commission's effort to establish a fair and just interpretation of the Robinson-Patman Act."

The principal contention made below in support of this order was that since petitioner had not offered evidence at the hearing to establish cost justification or the good faith

meeting of competition it was foreclosed from raising those issues in any proceeding for enforcement of the order. This wholly ignores the fact that a cease and desist order looks to the future, and that the prohibitions of this order extend far beyond the differentials which were litigated and found unlawful in New Orleans. The violations charged were differentials of 5% and 7½% in the prices charged New Orleans applicators and retailers. Petitioner could not have defended this charge by showing that a differential of 2% between certain of its customers, even in New Orleans, would have been justified by cost differences; yet future differentials in that amount or any amount are prohibited. Petitioner could not have defended by showing that a carload or other quantity discount on shipments from its New Jersey or New England factories was so justified, or that a lower price made to one of several competing customers in Chicago was made in good faith to meet competition. This order, nevertheless, extends to all such situations.

The Commission was, however, forced to concede that upon the basis of changed facts or circumstances petitioner should have the right to assert the defenses which the Act permits. It argued that if in the future petitioner should claim that certain prohibited differentials are lawful it might then resort to the Commission or to the court for relief from the order. It assured the court that it would not institute enforcement proceedings without first giving petitioner an opportunity to demonstrate *to the Commission* that its prices were justified by cost differences or by competition. Apart from the illusive character of such assurances, the fault with this order is that it prohibits differentials which were lawful when the order was issued and are lawful now. It is no answer to say that correction of present invalidity should be postponed to the future. Peti-

tioner is entitled to know now what this order prohibits so that it can comply with the order according to its terms.

The Court of Appeals seemingly accepted the Commission's assurances that it was not its intention to seek enforcement of this order beyond the boundaries of the statute. The court refused modification, but stated in its opinion that if there were any doubt as to the permissible scope of enforcement petitioner might rely upon the opinion itself. The opinion states (R. 155):

> "Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discriminations and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled."

And upon rehearing the court said further (R. 176):

> "Though affirming the order, we attempted to set at rest any doubts petitioner had that, in a subsequent proceeding based upon an asserted violation of the order, if it should arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to introduce in its defense evidence that the conduct com-

> plained of was permitted by exceptions contained in the Clayton Act itself as amended. This, as we understood its position, was substantially all petitioner desired."

It is apparent from the above quotations that the Court of Appeals has no intention of enforcing this order according to its terms. As we read these pronouncements they mean that (except as to differentials of the same character as those previously found unlawful) petitioner may violate the order with impunity so long as it complies with the law. This conception of an injunction does violence to established principles of equity jurisprudence. It is fundamental that in a proceeding for violation of an injunction the issue of violation is determined upon the terms of the injunction, not by reference to the law under which the injunction was issued. A valid injunction must be sufficiently definite and specific so that the person enjoined may look only to the injunction to ascertain what is necessary for compliance. This cease and desist order is definite and specific; yet the court below has given notice that it will not be treated as meaning what it says if an attempt is made to enforce it. The court says that it is unnecessary to write the statutory provisos into the order, but that, if called upon to enforce, it will read the provisos in anyway "to the extent that they are legally applicable."

The opinion below leaves the question of compliance with the order in a jumble of confusion and doubt. Petitioner must now guess to what extent the statutory provisos will be deemed "legally applicable" if it is charged with violation of the order's express terms. It must guess what differentials the Commission and a differently constituted court will find to be "legally permissible" under the statute. It must guess whether pricing and competitive situations existing today present a sufficiently "definite

change of circumstances" to warrant "a new hearing on the facts".

The Court of Appeals did not include in its decree a provision enjoining violation of the terms of this order. Exercising its discretion as a court of equity—a discretion which has never been questioned by this Court or by any court of appeals—the court found no present need for an injunction and limited its decree to affirmance. The court pointed out that the Commission had made no "showing of a threatened violation of its order", and found "uncontradicted evidence" of record that the practices upon which the Commission made its findings of violation had long since been abandoned by petitioner. In fact, the Commission had made no application for enforcement except for a bare request at the end of its brief, unsupported save by citation of a provision of the Federal Trade Commission Act having no application to this proceeding.

As matters now stand petitioner would not feel justified in assuming the burden of bringing this case to this Court for review. Petitioner feels that it has some protection, for the time being at least, against enforcement of this order according to its terms. Petitioner believes that it is and for many years has been complying with the Robinson-Patman Act, and with this order to the extent that it has been held enforceable. Petitioner has filed its report of compliance with the Commission as required by the order. It seems unlikely that any further proceedings under the order will be taken or found necessary. If the Commission does charge violation and applies to the court for enforcement, petitioner will then have the benefit of a judicial interpretation of the order upon a specific charge of violation. If the court should find a violation and should grant enforcement, petitioner would then be able to point out the necessity for limiting the injunction, if not the

order, to the differentials found unlawful by the Commission and (if extended to other differentials) to those unlawful under the Act.

The Commission, however, is unwilling to let the matter rest upon the opinion below. It is insisting that it should have a court injunction as a matter of right, regardless of any showing of necessity, and that the Court of Appeals has no discretion in the matter. The Solicitor General, in the Commission's behalf, has filed a petition for certiorari asking this Court to review the omission of an enforcement provision from the decree. We believe there is no merit in that petition; but if this Court should be inclined to grant it then we submit that it is imperative for the protection of this petitioner's rights that the Court also review the merits of the order which the court below has purported to affirm.

The Solicitor General is asking this Court to command the Court of Appeals to enforce the Commission's order. Such a mandate by this Court no doubt would be construed as implying approval of the terms of the order, and the court below probably would feel compelled to enforce the injunction accordingly. It is prayed, therefore, that if the Solicitor General's petition is granted, this petition be likewise granted. If the Solicitor General's petition is denied, then petitioner does not urge review at this time of the questions presented by this petition.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 15 of the United States Code, Section 21, and Title 28 of the United States Code, Section 1254(1). The final decree of the Court of Appeals was entered on September 5, 1951 (R. 181-182).

Questions Presented.

1. The Federal Trade Commission having found that differentials of 5% or more in the prices charged by petitioner for its roofing materials in certain local transactions with retailers and applicators were unlawful under Section 2(a) of the Clayton Act, may the Commission extend its cease and desist order

   (a) to the prohibition of differentials substantially less in amount between competing customers of the same and other classes without regard to whether such lesser differentials make only due allowance for differences in seller's costs resulting from differing methods of sale or delivery?

   (b) to the prohibition of differentials of any character or amount between competing customers at other locations served from other factories by different methods of distribution without regard to whether such differentials make only due allowance for seller's cost differences?

2. The respondent in a proceeding under Section 2(a) of the Clayton Act having failed to justify its lower prices as having been made in good faith to meet competition, and the Commission having found certain differentials to be unlawful, may the Commission validly prohibit all future differentials between competing purchasers without exception or exemption of lower prices thereafter made in good faith to meet the equally low prices of competitiors?

3. The Commission having found that the record does not establish discrimination in price by petitioner between wholesalers, and having made no finding as to what differential in the prices charged competing wholesalers would or might be sufficient in amount to substantially affect com-

petition, may the Commission validly prohibit any differential whatever in petitioner's prices to competing wholesalers under any competitive conditions anywhere?

4. May the Commission validly issue an order having the effect of prohibiting any price differential in the sale of roofing materials to competing manufacturers of prefabricated housing, without any allegation, proof or finding as to petitioner's merchandising methods or pricing in selling to such manufacturers?

Reasons Relied On for Allowance of the Writ.

This is a case of first impression. Ever since the enactment of the Robinson-Patman Act in 1936 the Commission's orders under Section 2(a) of that Act have regularly included an exception or proviso exempting differentials falling within the cost justification proviso of the Act. We believe this to be the first Section 2(a) case which has reached the courts presenting an order not containing such an exemption. We believe that this is also the first order brought up for review in which the Commission, after finding that differentials of a *certain* amount might substantially affect competition between the purchasers concerned, has prohibited *all* differentials regardless of amount. The Commission stated below that it regards this case as a "milestone" in its administration of the Robinson-Patman Act.

Furthermore, this is the first case since this Court's decision in *Federal Trade Commission* v. *Standard Oil Co.* (340 U. S. 231) presenting the question whether a Section 2(a) order prohibiting future price differentials between competing purchasers must include a proviso permitting the seller to meet competition in good faith within the limits of said decision.

1. The first proviso of Section 2(a) of the Clayton Act exempts from the prohibitions of that section "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered".

This order prohibits any price differential between competing purchasers of petitioner's roofing materials without regard for the fact that differentials which make only due allowance for differences in petitioner's costs are not prohibited by the Act. The granting of a quantity discount or other differential which could be so justified would be lawful, but nevertheless would violate this order.

Petitioner did not offer any evidence before the Commission that the differences in its prices to applicators and retailers in New Orleans in 1941 were justified by differences in its costs. Petitioner is, of course, foreclosed on that issue as to the discriminations then proved. But when the order is extended to the prohibition of other differentials, of any character or amount, it may not validly prohibit differentials which are within the range of cost differences resulting from different methods or quantities of sale or delivery. Even a differential of 5% in the prices charged these same New Orleans customers, or between other applicators or retailers in other areas, might be permissible when sales are made by other methods or in different quantities.

This order would prevent petitioner from offering a discount to customers purchasing in carload lots. The record shows that petitioner sells its products in carload and less-than-carload quantities, at different prices (R. 17-18). This carload differential was not involved in the transactions attacked in this proceeding, and petitioner had no

occasion to justify it. Yet this order would require petitioner to sell to all competing customers at one price, regardless of quantities purchased or method of sale or delivery.

The matter of inclusion in the order of exceptions or provisos permitting cost justification and meeting competition was presented and argued by petitioner before the Commission. Petitioner also filed exception to the failure of the trial examiner to include such provisos in his recommended order (R. 139). The Commission denied this exception (R. 142).

2. In its answer to the Commission's complaint petitioner pleaded the defense of meeting competition in good faith. In October 1945 the Commission issued its decision in the *Standard Oil* case (41 F. T. C. 263) holding that proof that the seller's lower price was made in good faith to meet the equally low price of a competitor is not a defense to a charge of unlawful price discrimination where resulting substantial injury to competition is affirmatively established. Petitioner did not press this defense at the hearings in New Orleans in the spring of 1946, but it did preserve its rights by insisting that a proviso preserving the defense as to future differentials be inserted in the order. This Court now having reversed the Commission and having held that meeting competition in good faith may provide an absolute defense in a case of this type (*F. T. C.* v. *Standard Oil Co.*, 340 U. S. 231), it is submitted that an appropriate proviso should be inserted in this order.

This order, if enforced according to its terms, would prevent petitioner from defending itself against a competitor's raid on its customers by meeting the competitor's price. Let us assume that petitioner is now selling its roofing materials to applicators and retailers in New

Orleans at identical prices, in compliance with the order; and that a month from now a competing manufacturer offers one of these customers a lower price for a comparable product. Under this order petitioner would be prohibited from meeting the competitor's price, except by lowering its price to all of its customers in that area, which this Court has held the statute does not require. Under such circumstances petitioner's customers would be easy prey to competition.

3. This order prohibits petitioner from selling its roofing materials at any differential in price *however small*, to purchasers competitively engaged in the resale or distribution of such materials *at any level of competition*. There is no qualification or proviso exempting differentials of lesser amount than those found to be sufficient to substantially affect competition. Only as to competition between applicators was there a finding that "a difference of one dollar or more" might be substantial (R. 148).

The order prohibits any differential in the prices charged competing wholesalers, jobbers or manufacturers. The Commission specifically ruled and found that the record does not establish discrimination between wholesalers (R. 140, 148-9). Discrimination between manufacturers is not even alleged. The only discriminations found were differentials of 5% or more in sales to purchasers "competing in the resale of these products as roofing contractors or applicators and as retailers" (R. 148). There is no finding that any given differential—and no finding as to what differential—in the prices charged competing wholesalers or manufacturers would be sufficient to substantially affect competition in any of the respects prohibited by Section 2(a) of the Clayton Act. Even as to retailers there is no finding that a differential of less than 2½% would be substantial. The order should have been restricted to the

prohibition of differentials between purchasers of roofing materials competing in the resale thereof as applicators or as retailers, and should have exempted differentials of less than 2½% between retailers.

Petitioner did not rely below upon any arbitrary or artificial classification of dealers in roofing materials either by itself or by the trade. It was and is conceded that petitioner's classification or designation of particular customers is immaterial. In using the terms "wholesaler", "retailer" and "applicator" we refer to purchasers in fact performing those respective functions in the resale or distribution of petitioner's products.

On this branch of the case the opinion below states petitioner's position incorrectly in several respects and thereby distorts the issues. It is stated that "petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35." The position actually taken was, and is, that one who is found guilty of exceeding a 30-mile speed limit for traveling 50 miles per hour should nevertheless not be prohibited thereafter from traveling 20 miles per hour or less. The Commission's function is to set the price differential speed limit upon evidence and findings as to what differentials may substantially lessen or injure competition. Here no speed limit was set for wholesalers, and as to retailers the limit was set at 2½%.

We believe that the Commission's failure to limit the differentials prohibited by this order to those which it has found sufficient in amount to have a probable adverse effect on competition is contrary to the decision of this Court in the *Morton Salt* case (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 54). The order there reviewed pro-

hibited differentials between competing wholesalers, and between competing retailers, in substantially the same language used in the present order, but each of the paragraphs contained a proviso exempting differentials of less than five cents a case which do not tend to lessen, injure or destroy competition. This Court rejected the provisos in this form, on the ground that it is the function of the Commission "to hear evidence as to given differential practices and to make findings concerning possible injury to competition"; and that the trial of this issue may not be shifted to the courts in subsequent enforcement proceedings. The court stated, however, that

> "Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do not decide".

We think the inference is clear that this Court did not give blanket approval to the outright prohibition of all differentials regardless of the evidence of record as to effect on competition; that its approval of language such as is used in the present order was subject to the requirement that it is the Commission's function to determine *what* differentials are substantial, and that differentials of lesser amount must be excluded by appropriate exception or proviso.

In the *Morton Salt* case this Court said further:

> "* * * Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not * * * taken action which forbids such noninjurious differentials. * * * "

That question is directly presented in this case.

Conclusion.

The decision of the court of appeals, and the order of the Federal Trade Commission thereby affirmed, present important questions of federal administrative law, not heretofore presented to this Court. In other respects the decision below is in conflict with well established principles previously enunciated by this Court. If this Court, upon the petition of the Solicitor General, is inclined to review the discretion of the court of appeals in omitting from its decree a provision enjoining violation of the terms of this order, then it is submitted that the validity of the order also should be reviewed, and that this petition for certiorari should be granted.

Respectfully submitted,

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